No. 226

In the Supreme Court of the United States

OCTOBER TERM, 1944

REPUBLIC AVIATION CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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CITATIONS

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OPINIONS BELOW

The opinion of the court below (R. 710–715) is reported in 142 F. (2d) 657. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 673–679, 627–654) are reported in 51 N. L. R. B. 1186.

JURISDICTION

The decree of the court below (R. 716–718) was entered on April 6, 1944. The petition for a writ of certiorari was filed on July 5, 1944. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Petitioner promulgated a rule prohibiting solicitation of any kind in its plant. One of its employees transgressed this rule by soliciting membership for a labor organization in the plant during the lunch hour and was therefore discharged. The plant is in a small community, distant from any city. Many of the employees live at great distances from it, and their homes are scattered over a very large area. The questions are whether, in the circumstances of this case, the Board could properly find (a) that petitioner by promulgating and enforcing such a rule, insofar as it prohibited employees from soliciting union membership on their own time, interfered with the exercise of the rights guaranteed employees under Section 7 of the Act, in violation of Section 8 (1); and (b) that petitioner violated Section 8 (3) and (1) of the Act by discharging an employee who transgressed the no-solicitation rule.

2. Whether, at a time when the majority of its employees had not designated any union as a collective bargaining representative, petitioner violated Section 8 (1) of the Act in forbidding the wearing of union "shop steward" buttons in the plant by employees who were shop stewards of a union then organizing its employees, and violated

Section 8 (3) and (1) of the Act by discharging three such employees because of their refusal to remove the buttons while in the plant.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 17–18.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 688–694, 627–654).[1] Briefly summarized, the facts, as found by the Board and as shown by the evidence, are as follows:[2]

Petitioner, a manufacturer of military aircraft, operates a plant in Babylon Township, Suffolk County, New York (R. 629; 11–12), the only plant here involved. This Long Island plant is not near any city (R. 639, n. 14; 66, 105, 447 cf. 105); the employees live at distances ranging from as much as 10 to 50 miles from the plant (R. 638;

[1] Except as noted in its decision, the Board adopted, without restating them, the findings, conclusions, and recommendations of the Trial Examiner who conducted the hearing (R. 689). Accordingly, whenever reference is hereinafter made to the Board's findings, such reference is to findings that the Board itself formulated or to findings of the Trial Examiner that the Board adopted.

[2] In the following statement, the references preceding semicolons are to the Board's findings and succeeding references are to the supporting evidence.

195); their homes are scattered over a wide area; most, if not all, of them have their lunch at the plant, at which they work long hours (R. 638, 639, n. 14; 55, 56, 73, 90, 119, 132, 160, 167, 193–194, 466, 195, 106, 107, 147, 187, 541–543).[3] In January 1943, the Union[4] informed petitioner by letter that it represented a substantial number of employees and requested a conference to establish a grievance procedure for them (R. 630; 609–610). In reply, Albert Kress, assistant to petitioner's president (R. 631; 540), wrote a letter to the Union, stating that petitioner's grievance machinery was in conformity with the Act and was operating satisfactorily (R. 631; 615–616). The conference that the Union requested was never held (R. 631; 570).

At the time of this exchange of letters, petitioner had a rule, which was printed in a handbook given all employees, that read: "Soliciting of any type cannot be permitted in the factory or offices" (R. 632; Pet. Exh. 1, R. 38–39, 706).

[3] Although the record does not reveal the number of employees at this plant, the number employed there at the time of the Board's hearing in April 1943 must have been very large since there is testimony that in one department alone, Shop 10, about 1,000 persons were employed on the day shift (R. 166, cf. R. 45, 46, 61, 98, 166, 210, 231, 248–249, 388, 428, 505; 541).

[4] International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-CIO, the union that filed the charges on which the Board issued the complaint (R. 1–2).

Employee Sam Stone, a shop steward of the Union (R. 632; 64–66), passed out union application cards in the plant during the lunch period on January 15, 1943 (R. 633; 283, 343). Supervisor Bofinger summoned Stone to his office after the lunch hour, called Stone's attention to the rule against solicitation, and warned him that he would be discharged if he continued to violate the rule (R. 633; 70–71, 88–89, 283–284, 345).[5] Stone replied that his union activities were protected by the Act and that he would continue them (R. 633; 71, 72, 89–90, 284). Immediately after giving Stone this warning, Bofinger prepared a request for Stone's release (R. 633; 288, 297, 359). Factory Manager Lasker refused, however, to approve Stone's release at this time but instructed Bofinger to observe personally whether Stone would again solicit in the plant (R. 633; 288–289, 298, 375). On January 20, Bofinger saw Stone solicit membership for the Union during the lunch

[5] During the week preceding this warning, Stone had also solicited membership for the Union but entirely outside working hours, and his union activities had come to the attention of the management (R. 632; 90, 313–315, 349–323, 326, 361). Supervisor Bofinger, on learning of Stone's union activities, conveyed the information to his supervisors and, though told by Superintendent Wilson that Stone was violating the plant rule, Bofinger did not at this time order Stone to desist but instructed Stone's foreman to observe and report Stone's union activity to him. The foreman carried out these instructions, giving Bofinger reports almost daily, which Bofinger passed on to his superior (R. 632; 323)...

hour and forthwith discharged him (R. 634; 74, 291).[6]

On January 13, 1943, the Union held a meeting at which employees Stone, Katz, Bobrow, and Kahler were designated shop stewards (R. 630; 66, 102, 183, 237). The next day, Stone and Katz began to wear in the plant buttons which bore the legend: "UAW-CIO Steward" (R. 631; 67, 103, Bd. Exh. 15). Stone, as has been noted, *supra*, pp. 5–6, was discharged on January 20. On January 22, Katz was summoned to a meeting of management officials at which Kress, the assistant to petitioner's president, asked Katz to remove his steward button, after telling Katz that the wearing of such buttons in the plant was forbidden because, in petitioner's view, they were tantamount to a misrepresentation that management had recognized the Union (R. 643; 122, 382, 561).[7] Katz agreed to remove the button until he could ascertain whether he had a legal right to wear it (R. 643; 122, 382, 561). At this conference, Factory Manager Lasker instructed [redacted] Foreman Doglione to discharge Katz if Katz should again wear a steward button in the plant (R. 643; 122, 383,

[6] Bofinger had been authorized by Lasker to discharge Stone if he personally saw Stone solicit in the plant (R. 633–634; 288–289, 291, 375–376, 406–407, 552).

[7] At an earlier conference on January 14, at which Katz was wearing his steward button (R. 643; 161), Lasker, however, told Katz that he could "wear any kind of union button, any kind of C. I. O. button, in any amount [he might] want to" (R. 642; 119, 160).

562). That night Katz discussed the question with the Union and became convinced that he had a right to wear the button (R. 643–644; 123). The next day he wore the button and Doglione discharged him, pursuant to Lasker's instructions (R. 644; 123).

On January 26, Bobrow and Kahler who, as has been noted, were union shop stewards, conferred with Kress and other management officials concerning the discharges of Stone and Katz and concerning petitioner's rules against solicitation and the wearing of steward buttons in the plant (R. 645; 187, 189, 238–239). At this conference, Kress reaffirmed petitioner's position on these matters (R. 645–646; 188–198, 239–242, 562–566), and Lasker warned Bobrow and Kahler that if they persisted in wearing steward buttons in the plant they would be discharged (R. 646; 198, 235, 241–242, 565). They continued, however, to wear their buttons and were discharged about an hour after the meeting (R. 646; 198–199, 242).

On January 15, Supervisor Doglione (R. 677; 497) asked Supervisor Bofinger to send him several employees to assist temporarily in his department (R. 632; 68–70, 279–281). When Bofinger brought Stone and another employee to Doglione, the latter, seeing that Stone was wearing a steward button, refused to accept him, saying: "I don't want to have him in my department. I have enough of this going around here." (R.

632–633; 69–70, 85). As Stone was returning to his own department, Bofinger remarked, "It seems that you fellows are not making any headway whatsoever here" (R. 633; 70, 86). On January 25, the first day on which Bobrow wore his steward button in the plant, Foreman Nepsee ordered him to stay at his bench and not to mingle with the other employees (R. 644; 183–185). When Bobrow asked whether he had done anything that merited such isolation, the foreman acknowledged that he had not, but insisted: "I just want you to follow these instructions from now on" (R. 644; 185–186).

Upon the foregoing facts, the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act. Respecting the no-solicitation rule, the Board found that in view of the conditions under which the employees worked and lived, the gas shortage and resulting transportation difficulties, the rule "entirely deprived them of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor" (R. 638). It further found that the rule under these circumstances "operates to render the beneficent purposes of the Act substantially impossible of achievement" (R. 639). The Board pointed out that petitioner had not shown that such a rule was necessary in maintaining production or discipline either by proof

"of special circumstances" or by reasons "warranting extension of the prohibition to non-working time, when production and efficiency could not normally be affected by union activity" (R. 674). It therefore held that this prohibition violated Section 8 (1) of the Act (R. 691). Respecting the prohibition against wearing steward buttons in the plant, the Board found that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity" (R. 691), and that, contrary to the belief that actuated petitioner in forbidding the practice, union steward buttons do not imply either that the employer has contractual relations with, or favors, the union (R. 690–691). It therefore held that this prohibition violated Section 8 (1) of the Act (R. 691). The Board also found that petitioner's surveillance of Stone to determine whether he was violating the no-solicitation rule, Doglione's refusal to accept Stone as an employee, Bofinger's remark to Stone disparaging the success of the union drive, and Nepsee's restriction on Bobrow's freedom of movement constituted interference in violation of Section 8 (1) of the Act (R. 677).

To remedy the foregoing unfair labor practices, the Board ordered petitioner to cease and desist from its violations of the Act, to reinstate with back pay the four men discharged for having violated the plant rule against solicitation and the prohibition against wearing steward buttons, to

rescind the rule against solicitation insofar as it applied to the employees' own time, and to post appropriate notices (R. 678–679). On March 22, 1944, the Circuit Court of Appeals for the Second Circuit held, one judge dissenting in part, that the Board's order should be enforced (R. 710–714, 714–715). On April 6, 1944, it entered a decree accordingly (R. 716–718).

ARGUMENT

We think that the decision below is entirely correct. We do not, however, oppose the granting of a writ of certiorari in this case because we believe that the questions presented are of importance in the administration of the Act. These questions have not been but should be settled by this Court. Moreover, we agree with petitioner that the decision below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *LeTourneau Co. of Georgia v. National Labor Relations Board*, decided June 23, 1944,* and with decisions of other circuit courts of appeals cited on pages 7 and 8 of the petition.

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*The Solicitor General has authorized the filing of a petition for certiorari in the *LeTourneau* case.

The instant case involves a no-solicitation rule applicable to the interior of the plant, whereas the *LeTourneau* case involves a rule prohibiting distribution of literature in parking lots outside the plant. However, the Board adopted substantially the same principle to deal with both situations. In reviewing these orders of the Board, the Second and Fifth Circuits have adopted conflicting rationales.

The issue here presented is whether and to what extent an employer may prohibit union solicitation or other union activity on company property but engaged in on the employees' own time. In its Eighth Annual Report, the Board, noting that this problem "appeared and reappeared,"[9] and was "of general interest," stated that it "felt it wise to evolve a clear and general policy for the guidance of employers and labor organizations alike." The Board's policy was stated in *Matter of Peyton Packing Company*, 49 N. L. R. B. 828, 843–844, modified on another point in 50 N. L. R. B. 355, enforced on other grounds, June 21, 1944 (C. C. A. 5), as follows:[10]

[9] National Labor Relations Board, Eighth Annual Report (Gov't Print. Off., 1944) p. 29. The following are some of the many cases in which the Board was called upon to consider the legality of such a plant rule or of its enforcement. *Matter of Carter Carburetor Corp.*, 48 N. L. R. B. 354, enforced, 140 F. (2d) 714 (C. C. A. 8); *Matter of Denver Tent & Awning Co.*, 47 N. L. R. B. 586, enforced, 138 F. (2d) 410 (C. C. A. 10); *Matter of Piedmont Shirt Co.*, 49 N. L. R. B. 313, enforced, 138 F. (2d) 738 (C. C. A. 4); *Matter of United States Cartridge Co.*, 47 N. L. R. B. 896; *Matter of North American Aviation, Inc.*, 56 N. L. R. B., No. 162; *Matter of Scullin Steel Co.*, 49 N. L. R. B. 405; *Matter of The Monarch Co.*, 56 N. L. R. B., No. 312; *Matter of Marshall Field & Co.*, 34 N. L. R. B. 1, 10-11. See also the cases cited at pages 7 and 8 of the petition for a writ of certiorari.

[10] In concluding that the discharges in the *Peyton* case were in violation of the Act, the Board relied not only on the proposition that a no-solicitation rule is presumptively violative of the Act if applied to the employees' own time but upon its finding "that the respondent's purpose in promulgating and enforcing the rule was to prevent the self-organization

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

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of its employees" (49 N. L. R. B. at 844, cf. 847). In enforcing the Board's Order, the Circuit Court of Appeals for the Fifth Circuit sustained only the second ground, saying: "The rule against solicitation though reasonable *and in lawful form*, was administered * * * in an arbitrary and discriminatory manner." [Italics supplied.]

" After setting forth this extract from its decision in the *Peyton* case, the Board declared in its Eighth Annual Report, at page 29:

In the instant case in finding that petitioner's no-solicitation rule, insofar as it applied to the employees' own time, was in derogation of the employee rights guaranteed in Section 7 of the Act, the Board, citing the *Peyton* case, adhered to the construction of the statute adopted in that decision (R. 689). The Board pointed out that under the circumstances here involved, enforcement of the no-solicitation rule would render virtually nugatory any attempt by petitioner's employees to exercise the rights guaranteed them by the statute. The Board found "that many of [petitioner's] employees live long distances from [its] plant and that their homes are scattered over a wide area" (R. 638). It further found that in plants like petitioner's "where transportation is particularly limited through gas rationing * * * and workers come from a radius of anywhere from 10 to 50 miles to work the shop would be the natural place for workers to talk to one another and persuade one another to join the union" (R. 638). Therefore, to quote from the Board's findings (R. 638), "Under the conditions obtain-

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The rule thus formulated by the Board is designed to protect the rights of employees under the Act, but at the same time to discourage needless interference with the uninterrupted production so vital under present wartime conditions. Since the decision in the *Peyton Packing* case, the Board has in general followed the rule there announced that an employer may properly prohibit union activities during working time, but not during the employees' own time even though they are on company property. * * *

ing in January 1943, the [petitioner's] employees, working long hours in a plant engaged entirely in war production and expanding with extreme rapidity, were entirely deprived [by the no-solicitation rule] of their normal right to 'full freedom of association' in the plant on their own time, the very time and place, uniquely appropriate and almost solely available to them therefor." After thus emphasizing the serious detrimental impact of the rule upon the employees' freedom of self-organization, the Board turned to a consideration of the possible detriment to the employer's legitimate interests that would flow from abrogation of the rule as applied to the employees' non-working time. It declared in this connection that "the record discloses no special circumstances, and the [petitioner] advances no cogent reason, warranting extension of the prohibition [of solicitation] to non-working time, when production and efficiency could not normally be affected by union activity" (R. 689).

In sustaining the Board, the court below held that the Board could properly weigh "what in fact will be the prejudice to the interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it" (R. 712). The court further held that the Board is empowered in the first instance to determine "whether the

benefit shall prevail over the prejudice or vice versa" (R. 712), and that "only in cases where [the reviewing courts] believe that there is no *reasonable warrant for the* priority actually awarded" (R. 713), may the courts set aside the Board's determination.

In contrast to the ruling of the court below, the Circuit Courts of Appeals for the Fifth, Sixth, Eighth, and Tenth Circuits have either held or said that the promulgation and enforcement of plant rules prohibiting solicitation on the employees' own time may not be held by the Board to constitute a violation of the Act unless the rules are adopted or applied for the purpose of discouraging membership in a labor organization. See cases cited at pages 7 and 8 of the petition for a writ of certiorari. Since, moreover, these courts exclude as irrelevant the competing considerations that the Board and the court below deem controlling, they accord no weight whatever to the Board's determination of which competing interest should prevail.

Except for this case, the courts have not passed upon the validity of an employer's rule against the wearing of union steward buttons in a plant as yet unorganized. The question is intertwined with the preceding one, for the same benefit-prejudice issues are present. Since the question will undoubtedly recur and is of importance in the administration of the Act, we likewise do

not oppose a review of this aspect of the decision below.

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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AUGUST 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1.

* * * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * * *

SEC. 10.

* * * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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